

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

Transmittal Sheet for Opinions for Posting

Will this opinion be Published? No

Bankruptcy Caption: In re James and Kathleen Cullen

Bankruptcy No. 95 B 25374

Adversary Caption: Judith Cullen v. James Cullen

Adversary No. 99 A 621

Date of Issuance: June 15, 2000

Judge: Ginsberg

Appearance of Counsel:

Attorneys for Plaintiff: Chester Foster, Jr. and John F. Sager

Attorney for Defendant: Forrest L. Ingram

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In Re:)	Chapter 7
)	
James P. Cullen and Kathleen Cullen,)	Bankruptcy No. 95 B 25374
)	
Debtors.)	Hon. Robert E. Ginsberg
-----))	
Judith Cullen,)	
)	
Plaintiff,)	
)	
v.)	Adv. No. 99 A 621
)	
James P. Cullen,)	
)	
Defendant.)	

Memorandum Opinion and Order

This matter is before the Court on Defendant's motion to dismiss the adversary proceeding for want of jurisdiction, or, in the alternative, for abstention. The Plaintiff, the Debtor's former wife, objects to the motion, arguing that she has a vested interest in all of the couple's marital property, including Debtor's pension, and that her interests were not affected by Debtor's bankruptcy case. She also argues that her claims are not barred by res judicata, collateral estoppel or laches. For the reasons stated below, the Court grants the Debtor Defendant's motion in part and denies it in part.

JURISDICTION

This Court has jurisdiction over Count I of this matter under 28 U.S.C. § 1334(b) as a matter arising under §§727 and 541 of the Bankruptcy Code. This matter is a core proceeding under 28

U.S.C. §157(b)(2)(I) and is before the Court pursuant to Internal Operating Procedure 15(a) (formerly known as Local Rule 2.33) of the United States District Court for the Northern

District of Illinois, which automatically refers bankruptcy cases and proceedings to this court for hearing and determination.

FACTS

James Cullen (“Debtor” or “James”) and Judith Cullen (“Judith”) were married on November 5, 1966. On September 6, 1990, they separated, and on August 2, 1992 they divorced. A Judgment of Dissolution of Marriage (“Judgment of Dissolution”) was entered in the Circuit Court of Cook County, Illinois. James and Judith reached an agreement regarding, among other things, maintenance, their respective rights in marital property, and the division of the marital property. This agreement was included in a Stipulation and Marital Settlement Agreement (“Stipulation”) executed on August 20, 1992 and incorporated by reference in the Judgment of Dissolution signed by the state court judge.

The instant dispute involves the parties’ claims to Debtor’s pension and related rights he became entitled to while working as a City of Chicago police officer. The Stipulation addresses the parties’ rights in these pension retirement benefits in Article V which states in relevant part:

6. The husband is a participant in the Policemen’s Annuity and Benefit Fund of Chicago. The husband’s interest in said fund is valued at \$281,083.62 and the entire interest is marital property. The parties acknowledge that the Police-men’s Annuity and Benefit Fund of Chicago is a municipal pension and under current law is not subject to a “Qualified Domestic Relations Order.” It is specifically agreed that a “Qualified

Domestic Relations Order”¹ will be entered if future changes in the law make the Policemen’s Annuity and Benefit Fund of Chicago subject to such an order.

7. At such time as the husband actually begins to receive pension or retirement benefits from the Policemen’s Annuity and Benefit Fun of Chicago, the husband shall have an affirmative duty to pay 30% of the marital portion of all such benefits received to the wife, and to direct that 30% of the marital portion of any and all benefits to be paid from the plan on account of the husband’s death, be paid to the wife. The term “marital portion” means the portion of the husband’s interest in the plan acquired by the husband during the marriage. This portion is determined by multiplying any benefit to be paid to or on behalf of the husband by a fraction, the numerator of which is the number of full months from the date of the parties’ marriage or the date the husband became a member of the plan, whichever is later, to the date of the Judgment of Dissolution of Marriage, and the denominator of which is the total number of months that the husband is a member of the plan prior to benefits being paid from the plan to the husband. Such payment shall be made by the husband to the wife within five days of receipt of pension or retirement benefits from the Policemen’s Annuity and Benefit Fund of Chicago. Except as otherwise herein set forth, this payment to the wife is in satisfaction of her full marital interest in the Policemen’s Annuity Benefit Fund of Chicago.

On August 11, 1998, the Illinois General Assembly passed and Governor Edgar signed HB 1612, which changes the Illinois Pension Code by adding Section 1-119, 40 ILCS 5/1-119, allowing for the entry of a QDRO if one of the parties is a member of a public pension system. The new law became effective on July 1, 1999. Until that date, public pension funds were not subject to involuntary transfer by means of the entry of a QDRO.

James has retired (or will do so in the near future). Upon his retirement, James will begin

¹ A Qualified Domestic Relations Order (“QDRO”) is a statutory exception to the anti-alienation provisions required for pensions governed by the Employee Retirement Income Security Act (ERISA). 29 U.S.C. §1056(d)(1). In general, an ex-spouse must have a QDRO in order to have an enforceable interest against a spouse’s ERISA-qualified pension. See In re Brown, 168 B.R. 331, 335 n. 6 (Bankr. N.D. Ill. 1994).

receiving pension payments from the Policemen's Annuity Benefit Fund of Chicago ("Pension Fund"). Judith claims that James told her that she is not entitled to any of the pension benefits because his obligations to her in connection with the Pension Fund were discharged in his Chapter 7 case. Judith moved to reopen the bankruptcy case, which had been closed on April 25, 1996, to file an adversary proceeding seeking a declaration that she holds a vested interest in the Pension Fund and other relief. On April 28, 1999, this court granted Judith's motion to reopen the bankruptcy case. See Cullen v. Cullen (In re Cullen), 2000 WL 381929 at *2 (Bankr. N.D. Ill. 2000).

On May 5, 1999, Judith filed a three count complaint giving rise to the instant adversary proceeding. In Count I, Judith seeks a declaratory judgment that she has a vested interest in the share of the Pension Fund awarded to her in the Judgment of Dissolution. In Count II, Judith contends that Debtor holds her share of the Pension Fund solely as a constructive trustee for her benefit, and seeks a judgment in the amount of any funds that Debtor has withheld that belong to her under the Judgment of Dissolution. She also seeks an order requiring Debtor, in the future, to turn over any funds from the Pension Fund that belong to her under the Judgment of Dissolution. In Count III, Judith contends that the portion of the Pension Fund awarded to her in the Judgment of dissolution is a "debt" owed by Debtor, and that the debt is not dischargeable under 11 U.S.C. §523(a)(5). See also 11 U.S.C. §§101(5), (12).

The Debtor moved to dismiss the complaint for failure to state a claim upon which relief can be granted. By Order entered on April 12, 2000, this Court denied the motion with respect to Counts I and II. See Cullen, 2000 WL 381929. The Court granted Debtor's motion to dismiss Count III of the complaint because Debtor and Judith intended their agreement with respect to the division of the Pension Fund to be a property settlement, and dischargeability of a property settlement is governed by

§523(a)(15). The time for bringing a complaint to determine the dischargeability of certain kinds of debts, including property settlements, under section 523(c) of the Bankruptcy Code is fixed by Fed. R. Bankr. P. 4007(c). Under that Rule, Judith had 60 days following the date first set for the meeting of creditors to be held pursuant to section 341 of the Bankruptcy Code to file a complaint seeking a determination of whether the Debtor's obligation to her was dischargeable. The first meeting of creditors was set for January 4, 1996. The time for filing a complaint to determine the dischargeability of a property settlement has long since run. Accordingly, this Court granted Debtor's motion to dismiss Count III.

The Debtor moved to dismiss the complaint, now consisting of only Counts I and II, for want of jurisdiction, or, in the alternative, moved the Court to abstain from hearing this matter pursuant to 28 U.S.C. §1334(c).

DISCUSSION

I. Jurisdiction

Bankruptcy Courts are courts of limited subject matter jurisdiction. Heritage Bremen Bank & Trust Co. v. Chicago Cement Co., 1990 WL 1688950 at * 4 (N.D. Ill. 1990). The district courts have exclusive jurisdiction over all cases under Title 11 and nonexclusive jurisdiction over all proceedings arising under Title 11, arising in a case under Title 11 or related to a case under Title 11. 28 U.S.C. §1334. Spaulding & Co. v. Buchanan (In re Spaulding & Co.), 111 B.R. 689, 692 (Bankr. N. D. Ill. 1990). However, the fact that jurisdiction over bankruptcy cases and proceedings exists does not mean that all bankruptcy disputes will be resolved by the district court. Instead, the Judicial Code permits the district court to delegate its bankruptcy jurisdiction to the bankruptcy court, for that court to exercise. See 28 U.S.C. §151(a). Internal Operating Procedure 15(a) (formerly known as

Local Rule 2.33) of the United States District Court for the Northern District of Illinois automatically refers bankruptcy cases and proceedings to this court for hearing and determination.

A. “Arising under” jurisdiction with respect to Counts I and II

For “arising under” jurisdiction to apply, the proceeding must involve “a cause of action created or determined by a statutory provision of title 11.” Spaulding & Co., 111 B.R. at 692. Judith seeks a declaratory judgment that she has a vested interest in the pension fund which was not divested by Debtor’s discharge in bankruptcy. She also seeks judgment in an amount equivalent to the amount of her share of the Pension Fund that Debtor has wrongfully withheld from her and requiring Debtor to turn over any future money he receives from Judith’s portion of the Pension Fund.

Count I, in which Judith seeks a declaratory judgment, arises under Title 11. As this Court noted in its opinion issued on April 12, 2000, Judith’s interest in the Pension Fund vested when the Judgment of Dissolution was entered by the Circuit Court. See Cullen, 2000 WL 381929 at *4. Judith now seeks a declaratory judgment that this vested interest was not divested by Debtor’s discharge in bankruptcy. Therefore, her cause of action against Debtor for her share of the Pension Fund is determined by a statutory provision of Title 11, since it depends upon whether Debtor owed her a debt that was discharged in bankruptcy under §727. Because her interest was vested before Debtor filed his Chapter 7 case, Judith actually owned part of the Pension Fund; therefore, her portion was not a “debt” owed to her by Debtor. Instead, her 30% portion is her property, not property of the estate, since Debtor had no interest in her share at the time of his bankruptcy filing. Thus, Debtor’s discharge under Title 11 had no effect on Judith’s interest in the Pension Fund. Although a QDRO was not entered by the circuit court, the Stipulation gave Judith the right to obtain a QDRO should any change in the law make her former spouse’s interest in his Pension Fund subject to such an order.

The law has in fact changed to so provide. Therefore, by agreement contained in the Stipulation, Judith now has the right to obtain a QDRO. That right cannot be discharged in a bankruptcy proceeding. See Gendreau v. Gendreau (In re Gendreau), 122 F.3d 815, 818 (9th Cir. 1997). A QDRO would give Judith an interest in the Pension Fund, which interest is created by state law. Debtor's interest in the Pension Fund at the time of the entry of the Stipulation was subject to being reduced by Judith obtaining a QDRO in the future. State property rights are recognized in bankruptcy. Gendreau, 122 F.3d at 819. However, generally a debtor cannot claim a greater interest in an asset than the debtor owned at the time the bankruptcy petition was filed. Id. at 819. Judith had obtained a 30% interest in the Pension Fund at the time of the Debtor's bankruptcy filing. As a result she does not have a debt that was discharged in bankruptcy; instead she has a 30% interest in the Pension Fund that is hers and hers alone. All the Debtor has is a 70% interest in the Pension Fund. This results from the Stipulation and the entry of the QDRO.

As a matter concerning whether the Pension Fund was property of the estate and whether there was a debt owed to Judith that was discharged in bankruptcy, Count I arises under §§727 and 541 of the Code. Therefore, because Count I arises under Title 11, Debtor's motion to dismiss Count I is denied.

The cause of action alleged in Count II, however, does not arise under Title 11. In Count II, Judith seeks judgment in the amount equivalent to her 30% share of the Pension Fund that Debtor has retained and requiring Debtor to turn over future monies he receives from Judith's portion of the Fund. The amount of Judith's interest in the Pension Fund is determined by state law, not Title 11, and thus, this Court does not have "arising under" jurisdiction over Count II.

B. "Related to" jurisdiction with respect to Count II

A bankruptcy court has jurisdiction to hear disputes between a debtor's creditors or non-debtor parties under the "related to" provision of 28 U.S.C. §1334(b) if such disputes "involve property of the estate or if resolving two creditors' intramural squabble will affect the recovery of some other creditor." Zerand-Bernal Group, Inc. v. Cox (In re Cary Metal Products, Inc.), 158 B.R. 459, 464 (N.D. Ill. 1993) (quoting Matter of Kubly, 818 F.2d 643, 645 (7th Cir. 1987)). It is not sufficient that the debtor's affairs overlap another dispute, unless resolution of the matter also affects the estate or the allocation of assets among creditors. In re Cary Metal Products, Inc., 158 B.R. at 464 (citation and internal quotation omitted). There is no related to jurisdiction here because Debtor received his discharge years ago, his case is closed, and thus there is no estate or person that could possibly be affected by any resolution of this matter. Additionally, even if there were still an estate, resolution of this matter would not affect the recovery of other creditors, because Judith's portion of the Pension Fund was never property of the estate, and thus was never available to any creditors or the trustee.

C. Ancillary jurisdiction with respect to Count II

A bankruptcy court may have jurisdiction to determine a proceeding even if there is no independent jurisdictional basis, if the claims involved are logically dependent and factually similar to the trustee's claims. In re Cary Metal Products, Inc., 158 B.R. at 464 (citation omitted). However, the general rule is that, if the underlying bankruptcy case is closed, the bankruptcy court will not exercise ancillary jurisdiction. Id. Ancillary jurisdiction is generally applied in unusual cases and is limited to circumstances where the non-bankruptcy forum cannot provide adequate relief, or where equity dictates that the bankruptcy court exercise such jurisdiction. Id. at 464-65. Factors to consider in determining whether to exercise ancillary jurisdiction include judicial economy, fairness and convenience to the parties, and the degree of difficulty of issues involved. Id. at 465.

Here, there is no compelling reason for this Court to exercise ancillary jurisdiction over Count II of Judith's complaint. The Debtor's case has been closed for years, and there is no possibility that any decision by this Court in this proceeding would affect creditors. Additionally, Judith can obtain adequate relief in state court, because her claimed interest in the Pension Fund is based upon state law.

Because this Court does not have jurisdiction over Count II of Judith's complaint, Debtor's motion to dismiss Count II is granted.

B. Abstention

Mandatory abstention under 28 U.S.C. §1334(c)(2) applies only to noncore proceedings. Dalen v. Clamage, 1997 WL 652343 at *4 (N.D. Ill. 1997). A core proceeding, as defined by the Seventh Circuit, is one that "invokes a substantive right provided by title 11 or . . . is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." S.N.A. Nut Company v. The Haagen-Dazs Company (In re S.N.A. Nut Company), 206 B.R. 495, 498 (Bankr. N.D. Ill. 1997) (citation omitted). At issue in Count I is Judith's interest in the pension fund, whether her interest became property of the Debtor's estate and whether the Debtor owed Judith a debt that was discharged in his bankruptcy case. Because issues related to property of a bankruptcy estate and discharge of a debt in bankruptcy could arise only in the context of a bankruptcy case, Count I is a core proceeding. Because Count I of this adversary case is a core proceeding, this court cannot abstain under the mandatory abstention provision of §1334(c)(2).

The next question, therefore, is whether this Court will exercise its discretion to abstain under the permissive abstention provision of 28 U.S.C. §1334(c)(1). That section provides:

Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title

11 or arising in or related to a case under title 11.

Abstention is “an extraordinary and narrow exception to the duty of the federal courts to adjudicate a controversy properly before it.” In re Gen-Air Plumbing & Remodeling, Inc., 208 B.R. 426, 433 (Bankr. N.D. Ill. 1997) (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976)). Thus, abstention is the exception, rather than the rule. Gen-Air, 208 B.R. at 433 (citation omitted). The party seeking abstention has the burden of establishing that abstention is appropriate. H.J. Rowe, Inc. v. Sea Products, Inc. (In re Talon Holdings, Inc.), 221 B.R. 214, 221 (Bankr. N.D. Ill. 1998) (citation omitted). Discretionary abstention under 28 U.S.C. §1334(c)(1) is warranted in the interest of justice or comity, or out of respect for state law. Id.

This Court concludes that permissive abstention is not appropriate in the instant dispute. Debtor has not established that abstention is appropriate, and Count I seeks a declaratory judgment with respect to the effect of bankruptcy on Judith’s interest in the Pension Fund. As discussed above, this cause of action “arises under” the Bankruptcy Code, and therefore there is no reason to abstain to further comity and respect for state courts.

Therefore, the Debtor’s motion to abstain is denied.

CONCLUSION

For the reasons stated above, the Court denies the Debtor Defendant’s motion to dismiss Count I of the adversary complaint. Leave is given the Defendant to file and serve an answer or otherwise plead to the remaining count of the complaint on or before June 29, 2000. Count II of the complaint is dismissed. The Debtor Defendant’s motion for abstention is denied. Status hearing on the

remaining Count I of the complaint is set for July 17, 2000 at 10:00 a.m.

ENTERED:

Date: June 15, 2000

ROBERT E. GINSBERG
U.S. Bankruptcy Judge